Supreme Court, U.S.
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No. 90-1815

In The

Supreme Court of the United States

October Term, 1990

THOMAS M. MURPHY, d/b/a
THOMAS M. MURPHY & ASSOCIATES,

Petitioner,

v.

PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, AIMS, INC., MASSACHUSETTS ASSOCIATION PLANS, INC., AND HARLEYSVILLE INSURANCE COMPANIES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, AIMS, INC., MASSACHUSETTS ASSOCIATION PLANS, INC., AND HARLEYSVILLE INSURANCE COMPANIES,

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Provident Mutual Life Insurance Company of Philadelphia ("Provident Mutual") and Harleysville Insurance Companies ("Harleysville"), hereby jointly request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed by Petitioner Thomas M. Murphy in May, 1991 be denied.

SUMMARY OF ARGUMENT FOR DENIAL

1. The petition ("Pet.") filed by Petitioner Murphy does not address the threshold issue in this case – whether Petitioner has met his burden under Rule 56(c), F.R.Civ.P. of showing the existence of each essential element of his case. Both the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals for the Second Circuit have held that Petitioner has no service mark or trademark rights in the "hot" advertising campaign theme and/or the thermometer graphic at issue. Petitioner has not alleged any error in this holding.

Having failed to establish this essential element of his case, the grant of summary judgment was proper. Thus, given the holdings below, it would be inappropriate for this Court to address the moot issues of the nature of the mark (descriptive), secondary meaning and likelihood of confusion raised by Petitioner.

2. In the absence of a trademark right or some other property right in the thermometer graphic and any evidence of passing off, Respondents Provident Mutual and AIMS Inc. ("AIMS") were free to adopt and use the identical thermometer graphic in connection with their advertisement for their insurance plan, "Plan USA". Petitioner fails to address this issue at all.

3. Petitioner's statement of facts set forth in the petition is incomplete and inaccurate. Additionally, Petitioner has created a false impression of the situation in the circuits on the issues of secondary meaning and likelihood of confusion. He does this by citing cases having to do with trade dress and not with service marks. Finally,

Petitioner mischaracterizes the basis for the Second Circuit's decision on the issue of likelihood of confusion.

ARGUMENT

A. Petitioner Failed to Meet His Burden Under F.R.Civ.P 56(c)

Respondents, Provident Mutual and AIMS, each filed a motion for summary judgment after more than eight months of discovery. Decision on these motions occurred more than ten months later after Petitioner had requested and received additional time to take discovery on all issues. Petitioner has not contended and does not contend that the motions were premature or that he did not have ample time for discovery.

After a motion for summary judgment has been filed, the non-movant, in this case Petitioner Murphy, has the burden of showing that there is a genuine issue of *material* fact which would preclude summary judgment. A material fact is a fact that affects the outcome of a suit under the governing law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 91 L.Ed.2d 202, 211, 106 S.Ct. 2505, 2510 (1986).

Petitioner has to make the required showing by adducing factual material which raises substantial questions as to the veracity or completeness of the moving parties' showings and/or by presenting countervailing facts. Murphy could not rely on the unsupported allegations of the complaint. *Beal v. Lindsey*, 468 F.2d 287, 291

(2d Cir. 1972). Also see, *Ashwell & Co. Inc. v. Transamerica Ins. Co.*, 407 F.2d 762, 766 (7th Cir. 1969).

To meet his burden, Murphy had to show more than a *mere scintilla* of evidence in support of his position. There had to be evidence on which a jury could reasonably find for Murphy. *Anderson v. Liberty Lobby*, 477 U.S. at 249-50.

Murphy also had the burden, in response to the summary judgment motions, of making a showing sufficient to establish the existence of those *essential* elements on which he would bear the burden of proof at trial. Failure to make the required showing for *any* essential element results in the movants being entitled to entry of summary judgment because there can be "no genuine issue as to any material facts" since a complete failure of proof concerning an *essential* element renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L.Ed.2d 265, 273, 106 S.Ct. 2548, 2552 (1986).

The function of a court in deciding a summary judgment motion is not to weigh the evidence and determine the truth of the matter but rather to determine whether there is a genuine issue for trial. There is no such issue however unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. The inquiry thus becomes whether the evidence presented is sufficient to submit the case to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. at 251-252.

Respondents submit that the courts below correctly carried out their responsibility. They carefully reviewed

the evidence presented by Petitioner and found it to be lacking on virtually every essential element of his claim. In other words, Petitioner failed to meet his burden under Rule 56(c). The petition is inadequate insofar as it fails to discuss this aspect of the case at bar.

B. Murphy Had No Protectable Trademark or Service Mark Rights In the Thermometer Graphic and/or the Hot Theme

Most significantly, the courts below held as a matter of law that Petitioner has no service mark or trademark rights in the thermometer graphic and/or the "hot" theme of the advertising. Petitioner does not allege any error in these holdings.

The three questions presented by Petitioner for consideration by this Court are all premised on the presence of protectable trademark or service mark rights in the thermometer graphic – which the courts below held did not exist.

In the District Court, Magistrate Smith's opinion (which was adopted, ratified and affirmed by Judge Eginton, after *de novo* consideration) was quite specific about the absence of any service mark or trademark right:

> " . . . , it should be clear that to the extent plaintiff [Murphy] is claiming the right to the exclusive use of a 'hot' theme or 'hot' campaign, protection is not available under § 43(a)" . . . (see, Appendix to Petition for a Writ of Certiorari (hereinafter "App.") at p. 24a).

Continuing, the Magistrate stated:

> "Since plaintiff cannot prevent defendants from adopting a similarly *themed* advertising campaign, he may be entitled to protect that component of the EDT ad which was allegedly copied, namely the thermometer graphic. It is apparent, however, that the graphic was neither used as a mark or functioned to identify and distinguish EDT from other plans, and therefore does not qualify as a potentially protectable trademark.
>
> It is beyond dispute that the thermometer actually was used and functioned as an 'attention-getting device' rather than an identifying mark . . . Its presence in the ad was dictated by plaintiff's desire to *promote* EDT; . . .
>
> Because the thermometer artwork did not function as a trademark, plaintiff cannot pursue his claim under § 43(a). A different result would serve to contravene federal copyright law by permitting virtually unlimited protection of artwork and other graphic materials under the Lanham Act when such protection is not available under the copyright statute". (App., pp. 24a-25a)

Addressing Petitioner's Second Count, i.e., a claim for violation of Connecticut's common law of unfair competition (which the parties treated as a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. State. § 42-110a et seq.), the Magistrate stated:

> " . . . [P]laintiff's failure to accrue a protected interest in the disputed artwork precludes recovery under this claim.[2]

---

[2] Although AIMS copied the Murphy artwork, 'in the absence of legally – defined exclusive rights,

> imitation and copying is permitted and, in fact, encouraged as an essential element of competition.' 1 J. McCarthy, *supra*, § 1:15; see also *American Safety Table Co. v. Schreiber*, 269 F.2d 255 (2d Cir.) *cert. denied*, 361 U.S. 915, 80 S.Ct. 259, 4 L.Ed.2d 185 (1959)." (App. pp. 30a-31a)

The Second Circuit Court of Appeals in affirming the District Court's decision held that Petitioner Murphy has no protectable service mark in his "hot campaign" and the "thermometer" graphic. Again, Petitioner does not contest this holding or allege any error in regard thereto.

The Second Circuit makes several critical observations in its opinion – the most significant of which is that "similarity, even identity, is not enough if Murphy had no interest in the words and the graphic that entitled him to restrict their use" citing *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 830 F.2d 1217, 1221 (2d Cir. 1987); *American Television & Communications Corp. v. American Communications & Television, Inc.*, 810 F.2d 1546, 1548 (11th Cir. 1987). (See App., p. 4a)

The Second Circuit also correctly observed that service mark rights cannot be established for services that are solely for the benefit of the performer. The services must be rendered to others. *In re Dr. Pepper Co.*, 836 F.2d 508, 509 (Fed. Cir. 1987); *In re Advertising & Marketing Development, Inc.*, 821 F.2d 614, 619 (Fed. Cir. 1987).

Applying this rule of law to the facts of this case, the Court of Appeals stated:

> "Assuming that Murphy's sale of his insurance expertise to others may be treated as a service under the Act, the advertising of this service, as distinguished from its performance may

> not . . . In short, the theme of Murphy's advertising campaign is not a service for which a service mark could be claimed. It follows that, if Murphy was selling insurance, a product, rather than his expertise in the field, he performed no services that a service mark might be said to identify". (App., p. 5a)

The EDT advertisement propounded by Petitioner (App., p. 32a) is clearly directed to the promotion of the *product* Employers Dental Trust, a dental insurance plan, and not his services. It talks solely about the features of the product, i.e., "available to groups with 3-49 employees", "choice of any licensed dentist", "orthordontia option available", etc. Even the fact that EDT is administered by Petitioner Murphy is a feature of the product. There is nothing in the advertisement which is remotely directed to the identification of a service to be performed by Petitioner for the benefit of others.[1]

Despite ample time to do so, Petitioner failed to meet his burden of making a showing sufficient to establish the existence of the alleged service marks – the most *essential* element of his case. Thus, the award of summary judgment was proper.

The discussions by the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit on the issues of the nature of the mark, i.e., a descriptive mark, secondary meaning and likelihood of confusion are nothing more

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[1] Again as stated by Magistrate Smith, "it is beyond dispute that the thermometer artwork was used and functioned as an attention-getting device; rather than an identifying mark". (App., p. 25a)

than an attempt by these courts to be thorough in pointing out the other deficiencies of Plaintiff's showings on the essential elements of his case. Even if this Court decided that the decision of the court below on the issues raised by Petitioner was in error, the ultimate result would not change. Summary judgment was properly granted because there was no service mark as a matter of law.

Petitioner's assertion that the key determination in this case was that the mark was descriptive and thus secondary meaning had to be shown is incorrect. The key determination was that *there was no protectable mark.*

C. Respondents Provident Mutual and AIMS Inc. Were Free to Use The Thermometer Graphic In Their Advertising

In affirming the dismissal of the unfair competition claim under Connecticut state law, the Second Circuit clearly stated:

> " . . . Because the thermometer graphic did not attain service mark status, the graphic was left in the public domain. Absent some legally defined exclusive right, the law permits and encourages imitation and copying of marks that are in the public domain. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-32, 84 S.Ct. 784, 788-89, 11 L.Ed. 2d 661 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38, 84 S.Ct. 779, 781-82, 11 L.Ed.2d 669 (1964); *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905-908 (2d Cir. 1980) . . . ". (App., p. 12a)

On appeal to the Second Circuit, Petitioner also raised an argument that he had trade dress rights in the

thermometer graphic. This argument was rejected by the court with Circuit Judge Van Graafeiland stating:

> "Murphy contends that his mark was a service mark, a mark that concededly played no role in the performance of the services. Neither the word 'hot' nor the thermometer was incorporated in or made a part of the plans or programs that Murphy produced. Although in a proper case a particular sales technique might be treated as part of a product's trade dress, . . . the contents of Murphy's advertisements, standing alone, cannot be considered as trade dress for his services. Under the circumstances, the court below did not err in failing to adopt the concept of trade dress." (App., p. 10a).

Having failed to establish any legally defined exclusive right such as trade dress, service mark or copyright, Petitioner could not prevent Respondents from using what he, through his own inadvertence or ignorance of the law, left in the public domain. The ability to copy such public domain material, absent passing off, is well established. See *Sears, Roebuck & Co. v. Stiffel. Co., supra; Compco v. Day-Brite Lighting, Inc., supra.*

On the surface it may appear that Respondents have committed an aggregious act by copying the thermometer graphic; however, Respondents did nothing more than that which the law allows them to do. It is Petitioner who failed to meet the legal requirements for an exclusive property interest.

There is no conflict in the courts of appeals as to whether absent a protectable property interest, copying is permissible providing the copyist does not attempt to pass off its goods or services as those of another. See, for

example, *Litton Systems Inc. v. Whirlpool Corp.*, 728 F.2d 1423 (Fed. Cir. 1984); *Hypertherm, Inc. v. Precision Prod. Inc.*, 832 F.2d 697 (1st Cir. 1987); *American Footwear Corp. v. General Footwear Co., Ltd.*, 609 F.2d 655 (2d Cir. 1979), *cert. denied*, 445 U.S. 951 (1980); *A.J. Canfield Co. v. Honickman*, 808 F.2d 291 (3d Cir. 1986); *Roho, Inc. v. Marquis*, 902 F.2d 356 (5th Cir. 1990); *Graphicana Corp. v. Baia Corp.*, 472 F.2d 1202 (6th Cir. 1973); *Aerosol Research Co. v. Scovill Mfg. Co.*, 334 F.2d 751 (7th Cir. 1964); and *Saxony Products, Inc. v. Guerlain, Inc.*, 513 F.2d 716 (9th Cir. 1975). Petitioner has never raised the issue of passing off in this case.

D. Petitioner's Statement Fails to Discuss Key Facts

For the sake of completeness, Respondents point out several key facts omitted from Petitioner's petition which the Court should be aware of in its deliberations.

On page 3 of the petition, Petitioner states that in January 1986, he created and marketed the dental insurance plan known as Employers Dental Trust. He neglects to state that during 1986, he used a hot coffee cup graphic to depict the "hot" theme of the advertising. According to Petitioner, the function of the coffee cup, as well as the thermometer, was solely as an "attention-getting" device.

Beginning in September, 1987, Murphy changed the theme of his advertising from "hot" sales to "boosted" sales and replaced the thermometer with a man on a rocket. In May, 1988, he changed again, this time to the theme of "rising" sales, with a man in a balloon replacing the man on a rocket. (App., p. 2a-3a). In short, Petitioner

used four different graphics in connection with EDT advertisements within a two year period.

Petitioner has contended that the usefulness of the thermometer graphic to him was destroyed by confusion. These contentions are unsubstantiated by any probative evidence. Petitioner unilaterally made the determination that the thermometer graphic was destroyed and decided to adopt new themes and graphics, i.e., the rocket and the balloon. Petitioner, despite ample discovery, has never proven that he suffered any damage from Respondents' activities or that these activities prevented him from continuing his use of the thermometer graphic.

Petitioner infers in his petition (see Pet., page 12, last line and Pet., page 18, last paragraph) that AIMS used the thermometer graphic as a mark. This inference is wrong. None of the Respondents have ever claimed any trademark or service mark rights to the thermometer graphic. This is because the thermometer graphic was never used in such a capacity. It was merely an adornment to the advertising for Plan U.S.A.

E. Petitioner's Assertion That The Courts Are In Conflict on the Issue of Secondary Meaning Is Incorrect

Petitioner argues that the Second Circuit's decision that he had to establish secondary meaning in the thermometer graphic is in error and, in fact, conflicts with the decisions of other courts of appeal. Respondents submit that this argument is incorrect.

Every circuit has adopted the rule that marks fall into four categories: (a) arbitrary or fanciful; (b) suggestive;

(c) descriptive; and (d) generic. *Every* circuit uses the same definition for a descriptive mark, i.e., it tells something about the product/service. Finally, *every* circuit requires a showing of secondary meaning for a descriptive mark. See *University of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1535 (11th Cir. 1985); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976); *Educational Development Corp. v. Economy Co.*, 562 F.2d 26 (10th Cir. 1977); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025, 54 L.Ed.2d 772, 98 S.Ct. 751 (1977); *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178 (5th Cir. 1980), *cert. denied*, 450 U.S. 981, 101 S.Ct. 1516, 67 L.Ed.2d 516 (1981); *Wiley v. American Greeting Corp.*, 762 F.2d 139 (1st Cir. 1985); *Safeway Stores, Inc. v. Safeway Discount Drugs Inc.*, 675 F.2d 1160 (11th Cir. 1982); *Bada Co. v. Montgomery Ward & Co.*, 426 F.2d 8 (9th Cir. 1970), *cert. denied*, 400 U.S. 916, 27 L.Ed.2d 155, 91 S.Ct. 174 (1970); *A.J. Canfield v. Honickman, supra; Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522 (4th Cir. 1984); *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324 (8th Cir. 1985); *Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc.*, 871 F.2d 590 (6th Cir. 1989); *In re Gyulay*, 820 F.2d 1216 (Fed. Cir. 1987); *Blinded Veterans Assoc. v. Blinded American Veterans Foundation*, 872 F.2d 1039 (D.C. Cir. 1989). Despite Petitioner's assertion to the contrary, there is no dispute amongst the circuits as to whether a showing of secondary meaning is required for a descriptive mark.

Petitioner's argument is thus reduced to a disagreement with the Second Circuit as to whether the thermometer graphic, assuming it was a mark, was descriptive.

Magistrate Smith in his opinion clearly set out the reasons why the graphic would be a descriptive mark and the Second Circuit affirmed.

The cases relied upon by Petitioner to support his position are hardly illuminating on this issue. The *AmBrit Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), case (Pet., p. 22) cited by Petitioner is a *trade dress* case having to do with the packaging used in connection with ice cream bars. It is easy to reconcile the decision in *AmBrit* and the case at bar – the facts are different. One (*AmBrit*) relates to the packaging used on a product. The other relates to an alleged service mark not used in connection with Petitioner's services. The same is true of the *Louisiana World Exposition v. Logue*, 746 F.2d 1033 (5th Cir. 1984), case cited by Petitioner. (Pet., p. 23) Petitioner's argument lacks any cogent discussion of why the District Court and Second Circuit analyses are in error in light of these cases.

Petitioner, on page 25 of his petition, cites a number of cases for the proposition that other courts of appeals do not require a showing of secondary meaning for unregistered non-verbal marks. On the surface, these cases appear to support Petitioner; however, a close examination shows that they too are easily distinguishable.

In *University of Ga. Athletic Ass'n v. Laite, supra*, the Court found the non-verbal mark (a depiction of a bulldog) to be suggestive and therefore, no showing of secondary meaning was required. The other cited cases are all *trade dress* cases, e.g. *Blau Plumbing, Inc. v. S.O.S. Fix-it*

Inc., 781 F.2d 604 (7th Cir. 1986) (*trade dress* case concerning rectangular box containing written information in particular format used in advertisements); *CPG Products Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007 (Fed. Cir. 1985) (*trade dress* case involving ornamental embellishments on luggage); *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695 (5th Cir. 1981), *cert. denied*, 457 U.S. 1126, 102 S.Ct. 2947, 73 L.Ed.2d 1342 (1982) (*trade dress* case involving packages used to sell lawn and garden products). As previously discussed, the Second Circuit rejected Petitioner's claim that he had *trade dress* rights to the thermometer graphic. The Second Circuit also rejected the argument that the thermometer graphic was suggestive.

Petitioner further argues that courts have found that intentional copying of a mark demonstrates that secondary meaning has been established. The cases relied upon by Petitioner are again primarily *trade dress* cases. *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421 (4th Cir. 1986), involves a claim of *trade dress* infringement wherein defendant was accused of copying a console housing a computer video game, the artwork on the glass panel upon which the video graphics were displayed, and the name "Hi-Lo Double Up Joker Poker". In the *Kramer* opinion, the Fourth Circuit notes that the Second Circuit does not require proof of secondary meaning when a defendant deliberately copies a plaintiff's *trade dress*. See *Kramer*, 783 F.2d at 449.

With respect to the other cases relied upon by Petitioner, *Osem Food Industries, Ltd. v. Sherwood Foods, Inc.*, 917 F.2d 161 (4th Cir. 1990), is a *trade dress* case involving the copying of plaintiff's package for dehydrated soup

and *Truck Equipment Service Co. v. Fruehauf Corp.*, 536 F.2d 1210 (8th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976), is a *trade dress* case involving defendant's copying of plaintiff's trailer-truck design. *Audio Fidelity, Inc., v. High Fidelity Recordings, Inc.*, 283 F.2d 551 (9th Cir. 1960), involves the language, the art work, and the format expressing the language used on record jackets. To quote the Court in *Audio*, "[t]his case raises no question as to patent, copyright or trademark". It is an unfair competition case.

In summary, the Second Circuit's consideration of Petitioner's showing on the issue of secondary meaning was correct.

F. Petitioner Mischaracterizes the Basis for the Second Circuit's Majority Opinion on Likelihood of Confusion

Petitioner mischaracterizes the decision of the Second Circuit when he states that "[i]n reviewing the district court's 'legal conclusion' that there was no likelihood of confusion, the court placed particular reliance on the fact that both Petitioner's ad and the AIMS ad listed the names of the plans, the administrators and the underwriters". (Pet., p. 7)

Circuit Judge Van Graafeiland in discussing the inadequacy of Petitioner's likelihood of confusion showing stated:

> " . . . Murphy argues that he had provided evidence of actual confusion with the affidavits of three insurance executives[2] in which they

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[2] The three insurance executives referred to by Judge Van Graafeiland include a close business acquaintance of Petitioner

(Continued on following page)

> state that they associated the thermometer graphic with Murphy and were initially confused when they saw the AIMS advertisement, thinking that Murphy had created it. However, to be relevant, Murphy's evidence of confusion must address the issue of whether the allegedly infringing advertisement created confusion as to the source of the insurance plans depicted in the advertisement. The three insurance executives stated that they were not confused as to the source of the plan. We agree with the magistrate's view that Murphy has not provided sufficient probative evidence to allow a jury to conclude that there was a likelihood of confusion". (App., p. 9a)

Respondents submit that the Court's review of the evidence proffered by Petitioner on the issue of likelihood of confusion, the only evidence on this issue, was appropriate and correct in the context of deciding a summary judgment motion. The Second Circuit, as well as the District Court, determined that Petitioner had not met his burden of making a showing sufficient to establish the existence of this element of his case. As shown above the Second Circuit clearly stated the reason why Petitioner's showing was deficient.

With respect to Petitioner's allegation that the Second Circuit relied heavily on the presence of the parties' names on the respective ads to decide the issue of likelihood of confusion, Respondents submit that this reading

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and two employees of EDT's underwriters who had responsibility for approving the EDT's thermometer advertising and whom are not members of the class to whom the advertising was directed.

is incorrect. Judge Van Graafeiland's opinion contains two sentences setting out the majority's view that the presence of the names helped avoid any confusion as to the source of the services or products in question.[3] A view which is amply supported by the testimony of the insurance executives who readily understood that the respective advertisements came from different sources.[4]

CONCLUSION

The Courts below found that the thermometer graphic at issue never attained service mark status and that Petitioner had no other exclusive right to its use. Petitioner does not allege any error or impropriety in these findings. The issues of likelihood of confusion and secondary meaning raised in the petition are therefore moot in the context of the present case.

Since the thermometer graphic was in the public domain and could be freely used by Respondents, given

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[3] Petitioner is inconsistent in urging that the Second Circuit acted improperly in considering the presence of the parties names on the respective advertisements (Pet.,p. 7) and at the same time urging that the Court should have considered AIMS' name on its ads as one of the factors in determining likelihood of confusion. (Pet., p. 18)

[4] The testimony of the insurance executives propounded by and relied upon by Petitioner was to the effect that they were confused as to the *ownership* of the hot thermometer campaign and the thermometer symbol. As pointed out by Magistrate Smith, such confusion is not relevant to Petitioner's claim of trademark infringement. The confusion must be as to the source of the respective plans. (App., p. 29a)

the total absence of any passing off, it would be inappropriate for this Court to ever reach the issues of secondary meaning and likelihood of confusion raised by Petitioner both of which presume the existence of a mark.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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[5] Provident Mutual Insurance Company of Philadelphis is not owned by any parent corporation and has no subsidiaries except wholly owned subsidiaries.

[6] Harleysville Insurance Companies has two major components: Harleysville Group Inc. and Harleysville Mutual Insurance Company. Harleysville Group Inc. has the following subsidiaries: Atlantic Insurance Company of Savannah, Harleysville Insurance Company of New Jersey, Huron Insurance Company, Worcester Insurance Company, New York Casualty Insurance Company and Phoenix General Insurance Company. Harleysville Mutual has the following subsidiaries: Pennland Insurance Company and Harleysville Life Insurance Company.